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## Winning at the Expense of Law: The Ramifications of Expanding Counter-terrorism Law Enforcement Jurisdiction Overseas

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# WINNING AT THE EXPENSE OF LAW: THE RAMIFICATIONS OF EXPANDING COUNTER- TERRORISM LAW ENFORCEMENT JURISDICTION OVERSEAS

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## INTRODUCTION

On August 7, 1998, terrorists bombed United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing twelve Americans and nearly three hundred Africans and wounding hundreds of others.<sup>1</sup> The United States dispatched the Federal Bureau of Investigation ("FBI") and Central Intelligence Agency ("CIA") to the bombsites to gather evidence and search for suspects.<sup>2</sup> Secretary of State Madeline Albright responded to these events by declaring war against international terrorism<sup>3</sup> and vowed to use all resources necessary to carry on the fight.<sup>4</sup> Approximately two weeks later, based on United States intelligence community information, the United States

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1. See James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied To Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, at A1 (describing events of the embassy bombings in Dar es Salaam and Nairobi).

2. See Jane Perlez, *FBI Chief Cites CIA Help In African Bombings Inquiry*, N.Y. TIMES, Sept. 15, 1998, at A5.

3. See *infra* notes 38-63 and accompanying text (discussing the various definitions of international terrorism used by the United States). This Comment advocates the FBI's definition of international terrorism since the FBI is the lead United States agency investigating international terrorist acts. See *infra* note 38 (providing the United States' definition of international terrorism).

4. See Tim Butcher & Hugh Davies, *U.S. Strike Was 'First Blow in the War of The Future' Washington Seeks Support for Long Campaign Against Global Terrorism*, WASH. POST, Aug. 22, 1998, at A1 (quoting Secretary of State Madeleine Albright's description of terrorism as "the war of the future").

preemptively struck<sup>5</sup> terrorist targets in Afghanistan and the Sudan with Tomahawk cruise missiles.<sup>6</sup>

In the past, the United States has employed diplomatic,<sup>7</sup> economic,<sup>8</sup> military,<sup>9</sup> and legal<sup>10</sup> strategies to combat terrorism abroad. Working within a larger framework of antiterrorism treaties and domestic legislation, the United States has combined all of these strategies to thwart the terrorist threat from overseas.<sup>11</sup> The danger of terrorism, however, increasingly threatens American lives and property

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5. See Bennet, *supra* note 1, at A1 (claiming that the United States took defensive measures against future terrorist aggression against American targets). Two examples of preemptive strikes by the United States against terrorist targets occurred when the United States bombed Libya in 1986 and Iraq in 1990. See *id.* at A11.

6. See *id.* at A17 (describing the United States' attacks against terrorist camps in Afghanistan and an alleged chemical weapons manufacturing facility in Khartoum, Sudan).

7. See *Public Report of the Vice President's Task Force on Combating Terrorism*, reprinted in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM*; U.S. PROCEDURAL ASPECTS 307-08 (M. Cherif Bassiouni ed., 1988) (noting that the United States is a party to many multilateral and bilateral agreements regarding terrorism abroad with nations such as Canada, France, Germany, Italy, Japan, and the United Kingdom).

8. See Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (prohibiting trade with Iran and Libya due to terrorist activities sponsored by those states); see also Meghan McCurdy, Comment, *Unilateral Sanctions With A Twist: The Iran Libya Sanctions Act of 1996*, 13 AM. U. INT'L L. REV. 397, 408-11 (1997) (discussing the United States' use of the Iran and Libya Sanctions Act of 1996 as a tool to fight international terrorism).

9. See Serge Schemenn, *How Can Terror Best Be Combated?*, N.Y. TIMES, Aug. 21, 1988, at A11 (detailing the United States' use of military strikes against terrorist targets in Afghanistan, Iraq, Libya, and the Sudan).

10. See Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 855 (codified as amended in scattered sections of 22 U.S.C.; most recently amended by Pub. L. No. 103-415 (1994)) (extending United States extraterritorial jurisdiction to foreign nationals involving injuries to Americans in acts of terrorism); see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (extending the legal means of fighting terrorism "by strengthened penalties, restricted appeals, and granted standing to victims in suits against foreign countries that sponsor terrorism").

11. See *infra* notes 64-75 and accompanying text (identifying past United States antiterrorism legislation).

as terrorists seek more powerful weapons and increasingly lethal tactics to achieve their goals.<sup>12</sup>

The United States classifies international terrorism as a crime and applies legal means as the primary tool to fight it.<sup>13</sup> Recently, however, the United States has shifted away from reactive counter-terrorism law enforcement methods<sup>14</sup> and towards more proactive<sup>15</sup> techniques to fight international terrorism.<sup>16</sup> The United States now perceives terrorist acts as acts of war.<sup>17</sup> In this regard—particularly in

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12. See *Counter-terrorism Policy Hearings Before Senate Judiciary Comm.*, 105th Cong. 123 (1998) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation) (characterizing the new overseas terrorist threat as more deadly, technologically advanced, and organized).

13. See *infra* notes 38-43 and accompanying text (discussing the United States' legal definition and classification of international terrorism).

14. See RONALD D. CRELSTEN & ALEX P. SCHMID, *WESTERN RESPONSES TO TERRORISM* 310, 310 (1993) (defining "reactive counter-terrorism policy" as short-sighted, incident-driven, and focused on past events). Reactive counter-terrorism strategies seek to deter and punish terrorist acts through legal means such as law enforcement and prosecutions. See M. CHERIF BASSIOUNI, *LEGAL RESPONSES TO INTERNATIONAL TERRORISM; U.S. PROCEDURAL ASPECTS* xlii (1988).

15. See CRELSTEN & SCHMID, *supra* note 14, at 310 (defining "proactive" responses to international terrorism as long-term, preventive, and seeking to watch and follow the terrorist before he or she strikes). In this Comment, the term "proactive" refers to the increasingly aggressive law enforcement counter-terrorism efforts of the United States. See Ethan A. Nadelmann, *The Evolution of United States Involvement in The International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 869 (1993). Proactive counter-terrorism strategies can involve reprisals, preemption, and retribution through military means. See generally BASSIOUNI, *supra* note 14, at 310-12. A discussion of these specific strategies is outside the scope of this Comment.

16. See *U.S. War on Terrorism*, S.F. CHRON., Sept. 6, 1998, at A6 (observing that President Clinton intends to move away from a passive response toward terrorism and retaliate when the United States is attacked); see also Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 95 (1989) (stating that the United States should move away from a passive antiterrorism strategy by embracing more active, preventive, and preemptive tactics); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (extending the FBI's law enforcement jurisdiction over terrorist acts against Americans abroad); 143 CONG. REC. H651-03 (daily ed. Feb. 26, 1997) (extending proactive measures in international counter-terrorism law enforcement to intelligence, crisis management, and coordination with other federal agencies).

17. See *infra* notes 52-63 and accompanying text (suggesting that terrorism abroad is an act of war against the United States).

light of the participation of numerous governmental agencies in counter-terrorism activities<sup>18</sup>—the expansion of law enforcement and intelligence agencies, such as the FBI and CIA, raises important jurisdictional questions.<sup>19</sup> Additionally, such expansion may impact domestic law as well as the field of international law enforcement.<sup>20</sup>

Part I of this Comment addresses the changing nature of international terrorism and its impact on law enforcement agencies and other antiterrorism actors. It also discusses why the United States has moved away from its passive legal strategy to combat terrorist acts overseas and assesses how United States legislation provides a basis for antiterrorism agencies to operate counter-terrorism strategies abroad. Furthermore, Part I evaluates whether the definition of international terrorism is so inclusive that agencies such as the FBI and CIA can properly fight terrorism abroad without overlapping jurisdictions.

Part II explores the basis for expanding the extraterritorial jurisdiction of the United States in relation to the growing authority and activities of law enforcement and intelligence bureaus and agencies. Part III examines the potential implications of law enforcement counter-terrorism activities overseas, considering consequences such as infringement upon sovereignty, adverse reciprocity in the international community, and the compromise of international and domestic law. Part IV comments on necessary improvements in United States international terrorism legislation and cooperative efforts, and offers recommendations that address potential legal consequences of United States law enforcement activities overseas.

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18. See *infra* notes 113-27 (discussing the roles of various agencies involved in counter-terrorism activities).

19. See *infra* notes 129-48 and accompanying text (analyzing the implications of expanding jurisdiction of the FBI and CIA in response to the changing nature of terrorism overseas).

20. See David B. Kopel & Joseph Olsen, *Preventing A Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 329-31 (1996) (identifying some barriers to the expansion of law enforcement agencies overseas and their impact on international precedent); see also *infra* notes 149-188 and accompanying text (discussing potential ramifications for expanding law enforcement jurisdiction overseas).

## I. BACKGROUND

The United States has historically initiated a legal response as its first reaction to international terrorist activities.<sup>21</sup> Legal mechanisms such as extradition and prosecution are primary examples of legal responses used by the United States against international terrorists.<sup>22</sup> The United States, however, has never relied solely on legal means to combat terrorism because legal strategies often prove to be insufficient mechanisms for deterring future terrorist attacks.<sup>23</sup> Furthermore, due to the seriousness of the new and potentially devastating terrorist threat,<sup>24</sup> there is an urgent need to take action *before* a terrorist attack occurs rather than *respond* to an attack with legal action.<sup>25</sup>

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21. See Lawrence A. Steckman & Timothy D. Aldridge, *Terrorism, Ideology and Rules of Law*, 1 TOURO J. TRANSNAT'L L. 213, 256 n.169 (1990) (stating that Americans are receptive to the use of law as a means of fighting terrorism abroad). Americans assume that the use of law will be effective in suppressing and regulating the conduct of terrorists abroad because Americans themselves respect the use of law and expect that others will as well. See *id.*

22. See Omnibus Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 855 (codified as amended in scattered sections of 22 U.S.C.; most recently amended by Pub. L. No. 103-415 (1994)) (providing a basis for the United States to prosecute terrorists for acts committed against Americans overseas); see also Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 64-71 (1990) (noting the United States efforts to renegotiate extradition treaties in order to prosecute international terrorists).

23. See BASSIOUNI, *supra* note 14, at xlii (stating that in cases of ideologically-motivated terrorism, legal deterrence proves ineffective); see also Timothy F. Malloy, *Military Responses To Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 287 (1987) (explaining that extradition treaties and domestic legislation are difficult to implement because of political pressures and loopholes in the extradition process).

24. See NEIL C. LIVINGSTONE, PROACTIVE RESPONSES TO TERRORISM: REPRISALS, PREEMPTION, AND RETRIBUTION IN INTERNATIONAL TERRORISM 219-20 (Charles W. Kegley, Jr. ed., 1990) (arguing that legal means do not conform to the new nature of the international terrorism threat, and the legal strategy does not deter international terrorists from acting).

25. See 143 CONG. REC. H651-03 (daily ed. Feb. 26, 1997) (describing law enforcement proactive measures as "prevention, immediate incident response, and post-incident response").

## A. INTERNATIONAL TERRORIST THREAT

The perceived threat that foreign terrorism poses to the United States impacts the laws and policies used to thwart it.<sup>26</sup> Although terrorist attacks against the United States have decreased in recent years,<sup>27</sup> terrorists now use more sophisticated and devastating weapons,<sup>28</sup> seeking targets that inflict the greatest damage on human life and property.<sup>29</sup> Terrorists now look to multi-millionaires<sup>30</sup> and entire nations for financial support.<sup>31</sup> They then use this money to acquire and use nuclear, chemical, and biological<sup>32</sup> weapons against the

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26. See *Agencies' Efforts To Fight Terrorism: Hearings Before the Subcomm. on National Security, International Affairs and Criminal Justice of the House Comm. Gov't Reform and Oversight*, 105th Cong. (1998), available in LEXIS online, Cong. Rec. [hereinafter *Agencies' Efforts To Fight Terrorism*] (statement of Richard Davis, Director of National Security Analysis, National Security and International Affairs Division) (asserting that since the 1970s, the United States' policy toward terrorism abroad has evolved concurrently with the perception and nature of the terrorist threat).

27. See U.S. Dep't of State, *Patterns of Global Terrorism: Annual Reports from 1995, 1996, and 1997* (visited Sept. 7, 1998) <[http://www.state.gov/www/global/terrorism/gt\\_index.html](http://www.state.gov/www/global/terrorism/gt_index.html)> (finding that the number of international terrorist acts decreased between 1995 and 1996); see also *Agencies' Efforts To Fight Terrorism*, *supra* note 26 (statement of Larry C. Johnson) (noting that international terrorism has fallen to a historic low).

28. See *Counter-terrorism Policy Hearings Before Senate Judiciary Comm.*, *supra* note 12 (announcing that the trend of international terrorism is to inflict the maximum amount of destruction to property and human life and create a sense of terror to gain media recognition).

29. See *id.* (noting that the purpose of foreign terrorist attacks is to inflict as many casualties as possible and cause significant destruction to property).

30. See Tim Weiner, *Man With Mission Takes On the U.S. At Far-Flung Sights*, N.Y. TIMES, Aug. 21, 1998, at A1 (noting that Osama bin Laden, president of "Terrorist University," provides major assistance to terrorist organizations and Islamic groups from his \$250 million fortune).

31. See *Counter-terrorism Policy Hearings Before Senate Judiciary Comm.*, *supra* note 12 (distinguishing the threat of international terrorism into three parts, including state-sponsored terrorists, terrorist organizations, and loosely affiliated extremists). Freeh explains how these three types of terrorists support their activities through financial and logistic means. See *id.*

32. See Robert Chesney, *National Insecurity: Nuclear Material Availability and Threat of Nuclear Terrorism*, 20 LOY. L.A. INT'L & COMP. L.J. 29, 61-62 (1997) (recognizing a demand among terrorists, at home and abroad, to acquire nuclear, biological, and chemical weapons to increase the deadliness of their attacks). Now that the Cold War is over, the proliferation of nuclear, chemical, and biologi-



United States.<sup>33</sup> Moreover, terrorists presently use conventional weapons that are increasingly technically advanced and more difficult to detect.<sup>34</sup> The advanced weapons available to terrorists pose an alarming national security threat, providing terrorists with the ability to destabilize entire regions by disrupting peaceful resolutions of conflicts<sup>35</sup> and to inflict massive harm against United States citizens and property.<sup>36</sup> Because of tactical and weaponry developments made by terrorists over the past decade, the United States now searches for solutions to the terrorist dilemma by passing legislation that adopts a preemptive strategy against the new, more advanced overseas terrorist threat.<sup>37</sup>

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cal weapons around the globe has likely increased. *See id.*

33. *See Agencies' Efforts To Fight Terrorism*, *supra* note 26 (statement of Richard Davis, Director, National Security Analysis for the National Security and International Affairs Division) (describing the danger posed to the United States by the sale and distribution of unconventional weapons to terrorists).

34. *See* 144 CONG. REC. S2989 (1998) (delineating the weapons that terrorists have in their arsenals).

35. *See World Wide Threat To National Security, Hearings Before the Senate Select Comm. on Intelligence on Current and Projected National Security Threats to the United States*, 105th Cong. 50 (1998) [hereinafter *World Wide Threat To National Security*] (statement of Phyllis E. Oakely, Assistant Secretary of State) (warning that terrorists abroad seek not only to disrupt resolution to the Arab-Israeli peace process, but also intend to interfere with United States interests in South America by creating regional instability and opposition).

36. *See Counter-terrorism: Hearings on Counter-terrorism, Before Senate Appropriations Comm.*, 105th Cong. 12 (1997) (statement of Louis Freeh, Director, Federal Bureau of Investigation) (noting that terrorism is a threat to the United States' national security); *see also Terror Has Become The World's Biggest Problem*, N.Y. TIMES, Sept. 22, 1998, at A5 (acknowledging that President Clinton defined terrorism as a prime concern of the United States in his address to the United Nations); Steven W. Krohne, *The United States and the World Need an International Criminal Court as an Alley in the War Against Terrorism*, 8 IND. INT'L L. REV. 159, 160 (1997) (statement of Secretary of State Warren Christopher) (stating that "President Clinton has rightly identified terrorism as one of the most important security challenges [America faces] in the wake of the Cold War").

37. *See* Randell K. Miller, *The Limits of the International Law Enforcement After Verdugo-Urquidez: Resurrecting Rochin*, 58 U. PITT. L. REV. 867, 868 n.9 (1997) (describing how increasing threats of criminal activity and international terrorism caused the United States to enforce its laws over international boundaries); *see also* ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 76 (1993) (predicting that the new technological developments available to terrorists, such as more discrete and potent weapons and explosives, will result in fresh, law en-

## B. DEFINING INTERNATIONAL TERRORISM

The changing nature of the terrorist threat overseas has forced American policymakers to reconsider the characterization and definition of international terrorism. The United States defines international terrorism as the "unlawful use of violence against the United States, citizens of the United States or any other nation, outside the boundaries of the United States, apparently intended to intimidate or coerce a civilian population, influence government policy, or to affect the conduct of a government for political or social objectives."<sup>38</sup> State agencies, however, have not universally adopted this definition<sup>39</sup> because it does not adequately address the changing nature of the terrorist threat overseas in two specific ways.<sup>40</sup> First, the present

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forcement techniques, new international conventions, and new realms of international law enforcement tactics and activities).

38. Antiterrorism Act of 1990, Pub. L. No. 101-519, 104 Stat. 2250 (codified at 18 U.S.C. sec. 2331 (Supp. 1991)). Defining terrorism as:

(A) violent acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appearing to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; (iii) to affect the conduct of a government by assassination or kidnapping; (C) occur outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

*Id.*

39. See Louis Rene Beres, *The Meaning of Terrorism-Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239, 240-44 (1995) (observing different definitions of terrorism). The United States Department of Defense defines terrorism as "the unlawful use or threatened use of force or violence by revolutionary organizations against individuals or property with the intention of coercing or intimidating governments or against societies, often for political or ideological purposes." *Id.* at 240 n.3. The FBI defines terrorism as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." *Id.* The United States Department of State defines terrorism as "premeditated, politically motivated violence perpetrated by noncombatants targets by sub-national groups or clandestine state agents." *Id.*

40. See Dave Martella, *Defending The Land of the Free and the Home of the Fearful: The Use of Classified Information to Deport Suspected Terrorists*, 7 AM. U. J. INT'L L. & POL'Y 951, 969 (1992) (arguing that law enforcement officials do not strictly comply with the definition of terrorism as a crime). In instances concerning immigration law, the definition of international terrorism is not limited to

definition of international terrorism subjectively defines a "terrorist" and does not establish consistent criteria to classify acts of terrorism as criminal.<sup>41</sup> Second, the United States increasingly characterizes terrorist attacks as acts of war because of their devastating consequences and the threat to national security.<sup>42</sup> For law enforcement and intelligence agencies, new developments concerning the terrorist menace and an indeterminate definition present inconsistent objectives and allow for the possibility of miscalculation and inadequate responses to terrorism abroad.<sup>43</sup>

### 1. *Terrorism as a Crime*

Classifying international terrorism as a crime creates a dilemma because, "[a] criminal act of terrorism to some will embody a legitimate act of self-determination to others."<sup>44</sup> At times, the United States, like other nations, has not strictly applied the definition of international terrorism to foreign acts, recognizing some terrorist acts

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criminal acts, but may also incorporate political beliefs. *See id.* at 969-70 (questioning law enforcement's discretion under the definition of international terrorism). *But see* Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 147 (1986) (suggesting that defining international terrorism as a crime ignores terrorist activities as a low-level conflict). By classifying terrorism as a crime rather than a war, the United States may miscalculate its approach to terrorism and improperly allocate resources against it. *See id.* at 148.

41. *See* Douglas Kash, *Abductions of Terrorists in International Airspace and on the High Seas*, 8 FLA. J. INT'L L. 65, 72-73 (1993) (arguing that although agencies' definitions of international terrorism are closely worded, the lack of uniformity among definitions prevents an adequate calculation as to whom is a terrorist); *see also infra* note 45 and accompanying text (exemplifying the subjective definition of international terrorism).

42. *See* Butcher & Davies, *supra* note 4, at A1 (quoting Secretary Albright classifying terrorism as war); *see also infra* notes 52-63 and accompanying text (discussing terrorism as an act of war).

43. *See* General Accounting Office, *Combating Terrorism; Federal Agencies' Efforts To Implement National Policy and Strategy* 16 (visited Dec. 24, 1998) <<http://www.gao.gov/reports.htm>> (explaining that different definitions of terrorism cause agencies to take a variety of counter-terrorism approaches).

44. CHARLES W. KEGLEY, JR., *INTERNATIONAL TERRORISM* 12 (1990) (statement of Christopher C. Joyner); *see also* BRIAN M. JENKINS, *INTERNATIONAL TERRORISM: THE OTHER WORLD WAR IN INTERNATIONAL TERRORISM* 29 (Charles W. Kegley, Jr. ed., 1990) (stating that the problem of defining international terrorism has led to the cliché "one man's terrorist is another man's freedom fighter").

as legitimate claims of groups seeking self-determination.<sup>45</sup> This method of defining terrorism is based on a political standard that leaves American foreign policymakers the discretion to decide which violent acts are acceptable<sup>46</sup> and allows for the subjective definition of some terrorist groups as revolutionaries.<sup>47</sup>

Currently, United States law defines international terrorism as a criminal act,<sup>48</sup> classifying acts of violence objectively rather than rendering subjective and potentially arbitrary political decisions.<sup>49</sup> This objective test for defining terrorist acts abroad is not applied in every case, however, resulting in the inconsistent classification of terrorism as a crime.<sup>50</sup> It also empowers law enforcement agencies responsible for determining who is a terrorist by granting them wide discretion to make subjective determinations.<sup>51</sup>

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45. See Beres, *supra* note 39, at 248 (suggesting how the definition of international terrorism can be manipulated or politicized). The Cold War between the United States and the Soviet Union best exemplifies this dilemma regarding the definition of international terrorism. See *id.* The United States perceived acts of violence against the pro-Soviet states as lawful, while labeling insurgent movements against nations sympathetic to the United States as terrorist. See *id.*

46. See *id.* at 248-49 (arguing that classifying terrorists according to national interests is arbitrary and capricious).

47. See *id.* at 240 (arguing that the United States classifies freedom fighters and terrorists arbitrarily according to the best interest of the United States).

48. See Antiterrorism Act of 1990, 18 U.S.C.A. sec. 2331 (West Supp. 1991) (criminalizing international terrorism).

49. See Martella, *supra* note 40, at 965-70 (noting that international terrorism can be defined under an objective test rather than as a political decision).

50. See Beres, *supra* note 39, at 240 (arguing that strictly defining international terrorism would classify the United States as a supporter of terrorism because of its support for the anti-Castro insurgency in Cuba and the Contra insurgency in Nicaragua).

51. See Martella, *supra* note 40, at 969 (asserting that the FBI has the power, under its present definition of terrorism, to investigate aliens according to political ideals on mere suspicion of terrorist activities). In instances of immigration, these agencies may determine terrorist activities without the commission of a crime. See *id.* at 969-70.

## 2. *Terrorism as an Act of War*

Little more than an ambiguous threshold exists to differentiate the level of violence distinguishing terrorist acts from acts of war.<sup>52</sup> This ambiguity results in inconsistent definitions of international terrorism that can potentially complicate uniform law enforcement responses to terrorist threats abroad.<sup>53</sup> It is the definition of international terrorism that is often used to determine which agency is best suited to implement an antiterrorist strategy.<sup>54</sup> Without a clear universal definition it is extremely difficult to render this agency determination.

In light of the recent terrorist activities overseas, the United States increasingly perceives transnational terrorism as acts of war.<sup>55</sup> Like an enemy in a war, terrorists aim to kill large numbers of combatants and non-combatants and attack strategic governmental and non-governmental targets in an attempt to damage the United States and disrupt international stability.<sup>56</sup> After the bombings in East Africa, Secretary of State Madeline Albright labeled international terrorism as "the war of the future."<sup>57</sup>

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52. See LIVINGSTONE, *supra* note 24, at 240 (commenting on the different interpretations of international terrorism).

53. See General Accounting Office, *supra* note 43, at 16 (finding that there is no universal definition of international terrorism among agencies fighting terrorism); 144 CONG. REC. E177, E178 (daily ed. Apr. 30, 1998) (statement of Rep. Skelton) (stating that agencies implement incoherent and disconnected strategies against international terrorism, resulting in a flawed policy).

54. See *Law Enforcement Techniques*, (NPR Morning Edition radio broadcast, July 6, 1998) (distinguishing the appropriate responses to international terrorist acts based on how international terrorism is defined). Many argue that if international terrorism is a crime, the FBI is the appropriate agency assigned to fight it. See *id.* But, if international terrorism is perceived as a low scale war, the CIA, the military, or the State Department arguably are the best options for counter-terrorist measures. See *id.*

55. See 144 CONG. REC. S2989, SS3002-3 (daily ed. Apr. 1, 1998) (statement of Sen. Domenici) (emphasizing that the international terrorist threat is not the same as in the past and depicts warlike qualities).

56. See *id.*

57. Butcher & Davies, *supra* note 4, at A1; see also *U.S. War on Terrorism*, *supra* note 16, at A6 (explaining that Clinton's campaign against terrorism is not yet fully defined, although the United States will clearly not remain a passive victim if attacked); Adam Garfinkle, *U.S. Right to Fight Fire with Fire; Terrorists Unmoved by Legal Approach*, ARIZ. REPUBLIC, Aug. 23, 1998, at E12 (stating that international terrorists such as Osama bin Laden are not deterred by American le-

Although terrorism does not exactly comport with the definition of war,<sup>58</sup> scholars classify it as irregular or low intensity warfare that involves armed attacks against both government and non-government personnel for political purposes.<sup>59</sup> Thus, approaching terrorism as a war<sup>60</sup> may be a more appropriate tack because the military is better equipped for low intensity warfare and is not limited by restrictions placed on law enforcement.<sup>61</sup> Nonetheless, the United States uses agencies such as the FBI and CIA, which are limited in jurisdictional and resource capacity, to treat and fight all overseas terrorist acts as criminal acts rather than as acts of war.<sup>62</sup> Scholars argue that the lack of agreement as to whether international terrorism is a crime or an act of war adversely impacts preventive and responsive measures to international terrorism.<sup>63</sup>

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gal mechanisms).

58. See BLACK'S LAW DICTIONARY 1583 (6th ed. 1990) (defining "war" as "hostile contention by means of armed forces, carried on between nations, states, or rulers, or between citizens in the same nation or state").

59. See Larschan, *supra* note 40, at 147 (characterizing terrorism as an armed conflict as opposed to a criminal act); see also Beres, *supra* note 39, at 239 (arguing that the definition of terrorism may be construed as criminal attacks on non-combatants, while at the same time classified as guerrilla warfare that necessitates a military response); Malloy, *supra* note 23, at 298 (statement of Alberto R. Coll) (observing that acts of terrorism overlap with traditional notions of war). Terrorist attacks that killed United States military personnel in Lebanon in 1983 and El Salvador in 1985 are instances where terrorism can be classified as acts of war. See *id.*

60. See Malloy, *supra* note 23, at 299 (asserting that the military should destroy terrorist planning and training facilities in nations harboring those terrorists).

61. See *id.* (arguing that the use of military action against terrorism as a form of low intensity warfare would be more effective and beneficial in long-term deterrence, short-term prevention, and punishment than political, diplomatic, economic, and legal responses).

62. See 135 CONG. REC. S8130-31 (daily ed. July 18, 1989) (statement of Sen. Specter) (discussing the possible structural changes for the FBI and CIA to meet the changing nature of terrorism abroad).

63. See Sofaer, *supra* note 16, at 90 (arguing that to fight international terrorism successfully, terrorism must be recognized as a national security threat and not just a crime); see also Larschan, *supra* note 40, at 139. Larschan states:

Transnational terrorism is nothing less than warfare against the United States and other governments. The various groups comprising the international terrorist network supported by a handful of states are conducting low-level armed conflict against democratic societies. And yet, even with the recognition that armed conflict is being waged, western states continue to rely upon the ineffective and increasingly impractical crimi-

### C. LEGISLATIVE RESPONSE TO TERRORISM OVERSEAS

In order to create comprehensive and well-reasoned antiterrorism legislation, Congress must obtain a clear understanding of the nation's goal and objectives in the fight against terrorism.<sup>64</sup> Presently, the United States' legislative responses to acts of terrorism abroad are aptly characterized as ad hoc and fragmented.<sup>65</sup> No congressional legislation comprehensively addresses international terrorism.<sup>66</sup> Instead, such legislation slowly evolves as the nature of terrorism changes.<sup>67</sup> This legislation is often piecemeal, arising out of rapid and

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nal law approach in dealing with transnational terrorism.

*Id.*

64. See *Hearings Before the Sen. Judiciary Comm.*, 105th Cong. (1998), available in LEXIS online, Cong. Rec. (statement of Sen. Kyl) (stating that before Congress creates antiterrorism legislation, it must have a definite understanding of the nation's objectives and standards for implementing those objectives); see also 144 CONG. REC. E717 (daily ed. Apr. 30, 1998) (statement of Rep. Skelton) (observing inefficiencies in present legislation that allocates resources for counter-terrorism efforts). Rep. Skelton noted that no "regular government-wide collection and review of funding data exists; the government failed to establish apparent priorities; no assessment process exist to coordinate and focus government efforts; and no government office or entity maintains authority to enforce coordination." See *id.*

65. See Jennifer A. Rosenfeld, *The Antiterrorism Act of 1990: Bringing International Terrorists To Justice the American Way*, 15 SUFFOLK TRANSNAT'L L.J. 726, 746 n.23 (1992) (describing the United States' legislative response to terrorism as reactive, reflexive, and haphazard); see also Richard Cummings, *The PLO Case: Terrorism, Statutory Interpretation, and Conflicting Obligations Under Domestic and Public International Law*, 13 HASTINGS INT'L & COMP. L. REV. 25, 28 (1989) (noting that the Antiterrorism Act of 1987 was "passed in the heat of passion not subject to congressional hearings nor to examination by any congressional committee"); Robert A. Friedlander, *The U.S. Legislative Approach*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM; U.S. PROCEDURAL ASPECTS, *supra* note 7, at 3, 20 (describing the congressional response to terrorism as piecemeal, reactive, and crisis-driven).

66. See Roberta Smith, *America Tries To Come To Terms With Terrorism: The United States Anti-terrorism and Effective Death Penalty Act of 1996 v. British Anti-terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249, 283-84 (1997) (finding that the United States does not pass specific legislation that focuses on international terrorism, but rather incorporates antiterrorism measures into other laws). But see Kash, *supra* note 41, at 77 (arguing that the Omnibus Diplomatic Security and Antiterrorism Act of 1986 is sufficiently comprehensive in addressing terrorism overseas).

67. See 144 CONG. REC. S2989, S3002-003 (daily ed. Apr. 1, 1998) (statement of Sen. Domenici) (affirming that the threat of international terrorism is still prominent and that the federal government must take necessary actions to meet this

passionate responses to domestic and international terrorist acts.<sup>65</sup> Moreover, there is a clear lack of consensus among policymakers on the definition of international terrorism and the exact threat<sup>69</sup> it poses.<sup>70</sup>

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threat). Senator Domenici notes that international terrorism evolves with the increasing use of technological weaponry, biological, chemical, and nuclear weapons, and a more deadly strategy. *See id.* at S3002. Furthermore, terrorists are becoming more multifarious and transnational, and seek to take increasing advantage of the United States' open, democratic society. *See id.* at S3003; *see also* Nadelmann, *supra* note 22, at 76 (concluding that the technological advancement of terrorist weapons impacts international responses to terrorism).

68. *See* 133 CONG. REC. S13,852 (daily ed. Oct. 8, 1987) (statement of Sen. Benjamin) (expressing that Congress did not thoroughly consider the Antiterrorism Act of 1987 as there were no hearings on the legislation, nor was it considered in committee); *see also* 141 CONG. REC. S5841 (daily ed. Apr. 27, 1995) (statement of Sen. Dole) (responding to the Oklahoma City terrorist bombing one week later by introducing the Comprehensive Terrorism Prevention Act of 1995). The Antiterrorism and Effective Death Penalty Act ("ADEPA") is an example of legislation enacted in light of a terrorist attack. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. After the Oklahoma City bombing, President Clinton signed into law a bill with strong bipartisan support that addressed both domestic and international terrorist issues. *See* Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 694 (1998) (stating that AEDPA and the Omnibus Counter-terrorism Act of 1995 were responses to domestic terrorist attacks).

69. *See Counter-terrorism Policy Hearings Before Senate Judiciary Comm.*, *supra* note 12 (defining the international terrorist threat against the United States as foreign-based and/or directed by countries or groups outside the United States, whose activities transcend national boundaries). Frech claims that over the past several years the threat of international terrorism has increased and will continue to increase in the future in the form of state-sponsored terrorism, formalized terrorists groups, and loosely-affiliated international Islamic extremists. *See id.*; *see also* Neil C. Livingstone, *Conspiracy in International Affairs: Terrorism: Conspiracy, Myth and Reality*, 22 FLETCHER F. WORLD AFF. J. 1, 13 (1998) (citing sharp divisions among policymakers over the perception of the international terrorist threat as one of the primary reasons why the United States is unsuccessful in combating terrorism). *But see*, Kopel & Olsen, *supra* note 20, at 256-57 (asserting that there is no United States domestic or international terrorism crisis); Stephen Rosenfeld, *Terrorism Oversimplified*, WASH. POST, June 29, 1984, at 19A (arguing that terrorism abroad is not the greatest danger facing America).

70. *See* Friedlander, *supra* note 65, at 20-25 (noting that the United States does not have a fully agreed upon definition of terrorism and that if the United States is to carry out criminal legislative directives against terrorism, there must be a uniform, coherent definition); *see also* EDWARD S. HERMAN & GERRY O'SULLIVAN, *THE TERRORISM INDUSTRY: THE EXPERTS AND INSTITUTIONS THAT SHAPE OUR*



This lack of consensus among policymakers is reflected in existing United States international antiterrorism legislation. Antiterrorism legislation has tended to focus on limited objectives,<sup>71</sup> copy provisions of multilateral treaties,<sup>72</sup> or simply to mix with current domestic terrorism legislation.<sup>73</sup> Furthermore, agencies have articulated and tailored their own unique definitions of international terrorism for their own specific purposes.<sup>74</sup> In any case, despite scattered and sometimes muddled legislation responding to terrorism abroad, Congress now seeks to expand law enforcement's jurisdiction overseas to provide agencies with additional power to combat terrorism.<sup>75</sup>

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VIEW OF TERROR 44 (1989) (describing the definition of terrorism as "murky," allowing western countries to name terrorists at their discretion).

71. See Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 855 (codified as amended in scattered sections of 22 U.S.C.; most recently amended by Pub. L. No. 103-415 (1994)) (extending United States jurisdiction to foreign nationals involved in acts that injured American citizens and cases where foreign nationals were prosecuted for involvement in acts of international terrorism, such as attempting to kill, killing, assaulting, or making a violent attack upon an American national); see also Brandon Chabner, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 UCLA L. REV. 985, 985 (1990) (stating that the Omnibus Diplomatic Security and Antiterrorism Act of 1986 addresses United States security concerns regarding the safety of its diplomats and citizens abroad).

72. See Convention for the Suppression of the Unlawful Acts of Hijacking, Dec. 16, 1970, 22 U.S.T. 1641 (prohibiting terrorist hijacking of airplanes and sea vessels); see also Convention for the Suppression of the Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565 (outlawing aircraft sabotage by international terrorists).

73. See generally Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (responding to insufficiencies in United States domestic and international terrorism laws after the Oklahoma City bombing).

74. See General Accounting Office, *supra* note 43, at 16 (observing that different definitions of terrorism can be a source for divergent policies among counter-terrorism actors).

75. See discussion *infra* Part II.C.

## II. AGENCIES ABROAD: FOUNDATION FOR UNITED STATES EXTRATERRITORIAL ACTIVITIES

### A. UNITED STATES BASIS FOR EXPANDING EXTRATERRITORIAL JURISDICTION

Extraterritorial jurisdiction<sup>76</sup> allows a country to exercise jurisdiction over criminal acts outside its own borders.<sup>77</sup> Extraterritorial jurisdiction over an alleged offender of a nation's laws is often granted under extradition<sup>78</sup> treaties between two nations.<sup>79</sup> Under international law, an individual country defines its own extraterritorial jurisdiction.<sup>80</sup> The legitimacy of these acts then limits the extension of a nation's extraterritorial jurisdiction, with legitimacy determined by the international community's acceptance of those acts over which a nation exercises extraterritorial jurisdiction.<sup>81</sup> Countries often use the

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76. See BLACK'S LAW DICTIONARY 588 (6th ed. 1990) (defining "extraterritorial jurisdiction" as "juridical power that extends beyond the physical limits of a particular state or country"); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES secs. 402, 403 (1987) (setting forth limitations on a nation's exercise of extraterritorial jurisdiction).

77. See Adam W. Weger, *Extraterritorial Jurisdiction Under International Law: The Yunis Decision as a Model for the Prosecution of Terrorism in U.S. Courts*, 22 LAW & POL'Y INT'L BUS. 409, 412-13 (1991) (explaining the concept of extraterritorial jurisdiction under international law as applied by the United States).

78. See BLACK'S LAW DICTIONARY 585 (6th ed. 1990) (defining "extradition" as "the surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territory of jurisdiction of the other, which, being competent to try and punish him, demands the surrender"); see also General Accounting Office, *supra* note 43, at 54-55 (discussing the United States' use of extradition treaties to apprehend terrorists abroad under Presidential Decision Directive 39).

79. See Nadelmann, *supra* note 15, at 832-36 (noting that the United States exercises its extraterritorial jurisdiction over international terrorists through extradition treaties).

80. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 404 (1987) (allowing states to set extraterritorial criminal sanctions against conduct that may affect the states security, integrity, or sovereignty).

81. See *id.* sec. 404 reporters' notes (1987) (noting that not all principles established under extraterritorial jurisdiction by nations are accepted under international

expansion of extraterritorial jurisdiction as a method to extend their right to prosecute international criminal acts.<sup>82</sup>

### 1. *Justifying Extraterritorial Jurisdiction*

Three international law principles support the legal theory of extraterritorial jurisdiction: the universality principle, the passive personality principle, and the protective principle.<sup>83</sup> First, the universality principle is premised on the finding that acts of terrorism are crimes against humanity, thus allowing a state to prosecute an offender on behalf of the world.<sup>84</sup> Second, the passive personality principle allows the extension of jurisdiction over offenders who victimize citizens of the particular nation seeking jurisdiction.<sup>85</sup> Third, the protective principle provides jurisdiction on the basis of a perceived threat to national security, integrity, or sovereignty<sup>86</sup> by an extraterritorial offense.<sup>87</sup>

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law); see also Jimmy Gurule, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L COMP. L. REV. 457, 469 (1994) (stating that the international community usually recognizes the application of extraterritorial jurisdiction "to protect and preserve vital national interests").

82. See Christopher L. Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM; U.S. PROCEDURAL ASPECTS, *supra* note 7, at 131, 139 n.26 (arguing that some nations, such as the United States in international narcotic cases, go beyond the international norms of extradition treaties).

83. See *id.* at 139-40 (defining the universality principle, the protective principle, and the passive personality principle). See generally RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 402 (Tentative Draft No. 6, 1985) (setting forth the rule of reasonableness for the bases of extraterritorial jurisdiction).

84. See Blakesley, *supra* note 82, at 142-53 (explaining the universality principle and its application to international terrorism). Nations can use the universality principle for extraterritorial jurisdiction over terrorism if it is universally accepted by nations that terrorism is a crime. See *id.* at 140.

85. See *id.* at 172-78 (providing a definition of the passive personality principle and explaining its application to international terrorism).

86. See BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (defining "sovereignty" as "the supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will").

87. See Blakesley, *supra* note 82, at 164-72 (defining and applying the protective principle to international terrorism).

## 2. *Applying Extraterritorial Jurisdiction Theories to Terrorism*

The extension of United States extraterritorial jurisdiction over acts of terrorism abroad arguably stems from all three of these principles.<sup>88</sup> The Omnibus Diplomatic Security and Antiterrorism Act of 1986 ("the Act") clearly meets the requirements of both the passive personality and protective principles.<sup>89</sup> The United States may justify jurisdiction over individuals abroad under the passive personality principle because the Act extends jurisdiction to terrorist acts that directly harm United States citizens.<sup>90</sup> Moreover, the Act satisfies extraterritorial jurisdiction under the protective principle by defining terrorist acts as those aimed to coerce or threaten government policy.<sup>91</sup>

If terrorism is universally recognized as a crime around the globe—such as the crime of genocide—the United States may also extend jurisdiction over terrorists under the universal jurisdiction principle on the basis of *hoste humani generis*.<sup>92</sup> Accordingly, these three principles provide the framework for United States extraterritorial jurisdiction over acts of international terrorism.<sup>93</sup>

These theories provide a sweeping foundation for the United States to exercise jurisdiction over terrorists abroad. There are few restrictions on the use of extraterritorial jurisdiction, and thus the United States has the opportunity to expand its law enforcement

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88. See Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Anti-terrorism Act of 1986*, 72 CORNELL L. REV. 599, 599 (1987) (concluding that the Omnibus Diplomatic Security and Anti-terrorism Act satisfies both the universality and passive personality principles of extraterritorial jurisdiction). But see Blakesley, *supra* note 82, at 177 (arguing that the passive personality principle is not widely accepted in American courts).

89. See Pub. L. No. 99-399, 100 Stat. 855 (1986).

90. See *id.* (declaring international terrorism to involve violent acts dangerous to American citizens abroad).

91. See *id.* (providing that the United States extend its jurisdiction over acts that kill or injure American citizens or acts intended to influence a government by intimidation or coercion).

92. See Blakesley, *supra* note 82, at 141-54 (stating that the universality principle can be a basis for extraterritorial jurisdiction).

93. See *id.* at 139-78 (finding that the basis for the United States justification for extraterritorial jurisdiction is founded under these principles).

presence internationally.<sup>94</sup> There is concern, however, that the Act provides the United States with broad and unobstructed powers to extend jurisdiction overseas.<sup>95</sup> The over-extension of extraterritorial jurisdiction by Congress, could produce unfavorable implications on international law.<sup>96</sup> As a result, the far-reaching United States extraterritorial jurisdiction over international terrorists presents potential consequences such as future reciprocal application by foreign nations,<sup>97</sup> unfettered law enforcement activities abroad, and possible infringement upon the sovereignty of other nations.<sup>98</sup>

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94. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 432 (1987) (discussing the minimal limitations on extraterritorial jurisdiction).

95. See Donnelly, *supra* note 88, at 617 (describing the extraterritorial jurisdiction of the United States as overly extensive); see also Richard Pregent, *Presidential Authority To Displace Customary International Law*, 129 MIL. L. REV. 77, 101-05 (1990) (arguing that the enabling statutes of the FBI, Department of Justice, and State Department provide the President of the United States with the potential ability to violate international law).

96. See *FBI Authority to Seize Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 16, 38-42 (1989) [hereinafter *FBI Authority to Seize Suspects Abroad*] (statement of Abraham D. Sofaer, Legal Advisor, United States Department of State) (noting possible infringement of international law by granting extraterritorial jurisdiction to FBI agents overseas). But see *id.* at 43-45 (statement of Oliver B. Revell, Associate Deputy Director-Investigations, Federal Bureau of Investigation) (arguing that the extraterritorial jurisdiction of the FBI will not result in the infringement of international law due to the cooperation and consent of other nations).

97. See Donnelly, *supra* note 88, at 618 (arguing that other nations could potentially reciprocate the limitless extraterritorial jurisdiction exercised by the United States under the passive personality principle). By setting a precedent under international law in creating long-arm statutes reaching individuals around the globe, the United States may subject itself to another nation's law enforcement, investigating acts against its nationals on United States soil. See *id.*

98. See Jost Delbruck, *A More Effective International Law or a New "World Law"?—Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 715 (1993) (noting that the expansion of a nation's jurisdiction could potentially infringe upon sovereignty). Similar to international human rights enforcement, the extension of law enforcement against international terrorism may result in infringement upon sovereignty of uncooperative states. See *id.* (noting violations of sovereignty arising out of the international enforcement of human rights).

## B. LAW ENFORCEMENT COUNTER-TERRORISM ACTIVITIES UNDER EXPANDED EXTRATERRITORIAL JURISDICTION

Based upon broad powers of extraterritorial jurisdiction,<sup>99</sup> American law enforcement agencies are authorized to investigate, apprehend, and prosecute terrorists who violate United States law.<sup>100</sup> Historically, the United States primarily exercised extraterritorial jurisdiction over criminal acts involving Canada and Mexico.<sup>101</sup> The twentieth century, however, witnessed an increase in extraterritorial activities by United States law enforcement involving other countries.<sup>102</sup> Activities in the areas of narcotics dealing and money laundering by the Drug Enforcement Agency ("DEA") and the Internal Revenue Service ("IRS")<sup>103</sup> provided a springboard for other law enforcement agencies, such as the FBI, to fight foreign terrorism.<sup>104</sup>

Presently, the FBI has prime responsibility in the United States for investigating terrorist activities.<sup>105</sup> In addition to its grant of authority under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, the FBI also has extraterritorial jurisdiction to combat terrorism under the Antiterrorism and Effective Death Penalty Act ("AEDPA").<sup>106</sup> The AEDPA authorizes the FBI to act as the lead

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99. See Omnibus Diplomatic Security and Anti-terrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 855.

100. See Blakesley, *supra* note 82, at 178-79 (recognizing the applicability of the three principles of extraterritorial jurisdiction to international terrorism).

101. See NADELMANN, *supra* note 37, at 15-102 (providing a history of United States law enforcement overseas).

102. See *id.* at 54-104 (citing the expansion of United States international law enforcement activities due to increased drug trafficking and financial crime).

103. See *generally id.* at 103-88 (contrasting the United States use of the DEA, IRS, and other law enforcement agencies against international enforcement efforts).

104. See *id.* at 156-57 (noting that existing international anti-narcotics activities provided agencies such as the FBI with experience and opportunity to investigate international terrorists activities).

105. See Federal Bureau of Investigation; Designation as Lead Agency to Combat Terrorism, 55 Fed. Reg. 11,585, 11,585 (1990) [hereinafter Federal Bureau of Investigation] (assigning the FBI to all international terrorism activities and investigations).

106. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

agency investigating international and domestic terrorist acts,<sup>107</sup> thus no longer rendering the agency an exclusively domestic counter-terrorism institution.<sup>108</sup> Accompanying its jurisdictional expansion, the FBI's budget<sup>109</sup> and activities<sup>110</sup> have grown considerably to meet the terrorist threat abroad.<sup>111</sup> As a result of this expanded authority of a traditionally domestic law enforcement agency to combat terrorism overseas, however, serious implications may arise as increased budgets and activities among various agencies complicate strategies against the threat of global terrorism.<sup>112</sup>

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107. See *id.*; see also Federal Bureau of Investigation, *supra* note 105, at 11,585. This designation authorizes the FBI to:

Exercise Lead Agency responsibility in investigating all crimes for which it has primary or concurrent jurisdiction and which involve terrorist activities or acts in preparation of terrorists activities within the statutory jurisdiction of the United States. Within the United States this would include the collection, coordination, analysis, management and dissemination of intelligence and criminal information as appropriate. If another Federal agency identifies an individual who is engaged in terrorist activities or in acts in preparation of terrorist activities, that agency is requested to promptly notify the FBI. Terrorism includes the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. . . .

*Id.*

108. See NADELMANN, *supra* note 37, at 150-56 (outlining the expansion of the FBI's overseas terrorism activities).

109. See *Counter-terrorism: Hearings on Counter-terrorism Before the Senate Appropriations Comm.*, *supra* note 36, at 17-18 (1997) (statement of Louis Freeh, Director, Federal Bureau of Investigation) (providing figures for the FBI's counter-terrorism spending). In 1995, Congress appropriated \$77.1 million to the FBI; in 1996, the FBI received \$158.8 million for counter-terrorism activities, and in 1997, Congress allocated \$133.9 million in new antiterrorism resources. See *id.* at 12.

110. See *FBI Oversight: Hearings Before Subcom. on Crime of the House Judiciary Comm.*, 105th Cong. 33 (1997) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation) (explaining the expansion of the FBI to investigation of terrorist use and the threat of weapons of mass destruction, intelligence gathering and analysis, and the expansion of legal departments and training centers overseas). The FBI uses "Legates"—legal attaché offices—to assist the FBI in antiterrorist initiatives and coordinating activities with local police of other countries. See *id.* (noting the FBI's expansion of the Legates offices overseas and the establishment of a law enforcement academy in Budapest, Hungary).

111. See *id.* (discussing the growing activities of law enforcement agencies to meet the threat of international terrorism).

112. See generally *infra* notes 113-26 and accompanying text (providing analysis of agency allocation of money and authority).

## C. THE SCOPE OF LAW ENFORCEMENT'S ANTITERRORISM ACTIVITIES OVERSEAS

### 1. *Status of Law Enforcement Antiterrorism Initiatives Abroad*

The ever-present fear of a disastrous domestic or international terrorist attack<sup>113</sup> compels legislators to provide United States law enforcement agencies with unprecedented authority<sup>114</sup> and money<sup>115</sup> to prevent terrorist acts.<sup>116</sup> Because the menace of terrorism impacts almost every aspect of society, numerous agencies besides those specifically charged with law enforcement are involved in counter-terrorism programs.<sup>117</sup> These agencies implement a wide range of counter-terrorism activities such as deterrence, prevention, support,

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113. See 141 CONG. REC. S5841 (daily ed. Apr. 7, 1995) (statement of Sen. Dole) (proposing legislation in response to the Oklahoma City terrorist bombing); see also 144 CONG. REC. S2938-39 (daily ed. Apr. 1, 1998) (statement of Sen. Domenici) (urging the Senate to pass legislation adapting the law to the changing nature of the terrorist threat from abroad).

114. See *Counter-terrorism Policy Hearings Before Senate Judiciary Comm.*, *supra* note 12 (discussing the expanded activities of the FBI overseas, including intelligence gathering and international cooperation programs); see also *Law Enforcement Techniques*, *supra* note 54 (noting that the FBI has expanded from a primarily domestic law enforcement agency to an international law enforcement agency).

115. See 141 CONG. REC. S5843 (daily ed. Apr. 27, 1995) (statement of Sen. Hatch) (proposing an increase of \$1.6 billion in appropriations for counter-terrorism efforts in 1994-1995); see also Janet Hook, *\$500-Billion Budget Accord Is Reached*, L.A. TIMES, Oct. 16, 1998, at A1 (noting that counter-terrorism initiatives would receive approximately \$2.4 billion in 1999). This increase in spending for antiterrorist activities is a response to the recent bombings in Kenya and Tanzania. See *id.* President Clinton plans to spend \$10 billion in counter-terrorism activities for 2000, "including a tripling of FBI resources since 1993." Vernon Loeb, *Embassy Attacks Thwarted, U.S. Says; Clinton Seeks \$10 Billion to Fight Terrorism*, WASH. POST, Jan. 23, 1999, at A2.

116. See *Counter-terrorism: Hearings on Counter-terrorism Before the Senate Appropriations Comm.*, *supra* note 36, at 8 (setting forth FBI counter-terrorism appropriations between 1995-1998, including the hiring of new agents and support personnel).

117. See General Accounting Office, *supra* note 43, at 26 (explaining that numerous agencies are incorporated into the counter-terrorism strategy to deter and disrupt destruction of telecommunication systems, transportation systems, electric power systems, water supply systems, banking and financial systems, gas and oil systems, and daily government operations).



response, and crisis management.<sup>118</sup> Additionally, these agencies offer specialized capabilities and additional resources to law enforcement, the coordination of activities among the agencies is essential for successful antiterrorism efforts.<sup>119</sup> Cooperation, however, is impaired by the lack of an adequate and accountable authority to oversee and manage antiterrorism programs and activities.<sup>120</sup>

Congressional initiatives and Presidential Decision Directives do not produce meaningful policies for the coordination of agencies and the implementation of effective strategies.<sup>121</sup> Moreover, funding and resources for counter-terrorism programs are distributed without any regards to prioritization of programs or evaluation of the success of programs.<sup>122</sup> Duplicated antiterrorism ventures and overlapping agency activities raise serious questions regarding possible jurisdictional infringement,<sup>123</sup> abuse, and miscalculation of the terrorist threat.<sup>124</sup>

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118. *See id.* at 17-25 (listing the various agencies and their roles in fighting international terrorism). For instance, the Bureau of Alcohol, Tobacco and Firearms ("ATF") assists the FBI with explosive investigations. *See id.* at 43 n.3.

119. *See* General Accounting Office, *Combating Terrorism: Observations on Crosscutting Issues* (visited Dec. 24, 1998) <<http://www.gao.gov/reports.htm>> (acknowledging that cooperation is paramount for domestic and international counter-terrorism efforts).

120. *See id.* at 5 (observing that the National Security Council ("NSC") and Office of Management and Budget ("OMB"), as overseers of counter-terrorism programs and activities, do not require agencies to submit funding and spending data on counter-terrorism programs). The NSC and OMB have not established priorities for developing an effective strategy against terrorism, nor have they accounted for interagency antiterrorism operations. *See id.*

121. *See* 144 CONG. REC. E1843 (daily ed. Sept. 28, 1998) (statement of Rep. Skelton) (asserting that there is a need for further cooperation among agencies and that interagency problems must be worked out through legislation); *see also* General Accounting Office, *supra* note 119 (reporting a need for further refinement of antiterrorism policy through Presidential Decision Directives).

122. *See* 144 CONG. REC. E717 (daily ed. Apr. 30, 1998) (statement of Rep. Skelton) (recognizing the existence of inefficiencies involving terrorism-related funding, prioritization, and appropriations based upon GAO reports).

123. *See* General Accounting Office, *supra* note 119 (noting that coordination of inter-agency activities raises issues involving jurisdictions among agencies).

124. *See infra* notes 173-188 and accompanying text (discussing possible implications of inefficient coordination among counter-terrorism agencies).

The combined enterprises of approximately forty agencies fighting international terrorism<sup>125</sup> require clear appropriations legislation and an accurate assessment of government spending and funding in relation to the threat and risk of terrorist activities.<sup>126</sup> The consequences of mismanaging and misprioritizing antiterrorism undertakings both diminish deterrent measures against international terrorists and leave the United States vulnerable to future attacks abroad.<sup>127</sup>

## 2. *Relationship between Counter-terrorism Law Enforcement and Intelligence Agencies*

The FBI and CIA now lead the fight against terrorism abroad.<sup>128</sup> The potential for mismanagement and the lack of congressional oversight of antiterrorism initiatives discussed above are particularly relevant to these two agencies.<sup>129</sup> The FBI's global terrorism program

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125. See General Accounting Office, *supra* note 43, at 3 (providing the number of agencies, departments, and bureaus combating terrorism at home and abroad).

126. See General Accounting Office, *Combating Terrorism: Spending on Government-wide Programs Requires Better Management and Coordination*, (visited Oct. 24, 1998) <<http://www.gao.gov/reports.htm>> (finding that, in 1997, there was uncertainty regarding government spending and funding for antiterrorism activities). Counter-terrorism policies are in disarray because 1) agencies define antiterrorism and counter-terrorism differently; 2) terrorism-related budget line items are joint and not apportioned; 3) multiple functions of agencies create difficulties allocating costs of terrorism-related activities; 4) amounts stipulated by appropriations legislation are not identifiable; 5) and antiterrorism programs and activities receive funds from different appropriations within the agency. See *id.* The lack of accountable terrorism programs can lead to potential miscalculation of priorities, misimplementation of policy and strategy, repetitive activities on the part of agencies, or misallocation or gaps in spending. See *id.* at 3. This problem invokes uncertainty of whether terrorist acts abroad, when classified as criminal acts, amount to actions that are within the legal and practical scope and capacity of agencies assigned to fight terrorism. See *id.* at 3-5.

127. See 144 CONG. REC. E717, E718 (daily ed. Apr. 30, 1998) (statement of Rep. Skelton) (warning that inefficiencies in counter-terrorism programs increase the risk of a devastating international terrorist attack).

128. See General Accounting Office, *supra* note 43, at 30, 53-54 (noting that the CIA is primarily responsible for overseas intelligence gathering); see also *id.* at 39 (finding that the FBI, with the assistance of the Department of State, is the lead investigation agency for overseas terrorism).

129. See 135 CONG. REC. S8130, S8134 (daily ed. July 18, 1989) (statement of Sen. Specter) (recognizing the need to coordinate policy between the two agencies to avoid abuse and miscalculation).

is responsible for investigating and preventing terrorist acts by groups or individuals who are directed from abroad or whose activities cross national boundaries.<sup>130</sup> The CIA provides intelligence on overseas terrorism, disrupts and penetrates terrorist activities, and carries out covert operations against international terrorists.<sup>131</sup> Due in part to inter-agency cooperative efforts, vague legislation resulting from the full-scale attempt to prevent terrorism, and the increase in the FBI's counter-terrorism abilities, the FBI continually overlaps activities and traditional duties of other agencies, such as the CIA.<sup>132</sup> For example, the FBI engages in international intelligence gathering concerning terrorists, a role traditionally held by the CIA.<sup>133</sup> These

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130. See *Counter-terrorism Policy Hearings Before Senate Judiciary Comm.*, *supra* note 12 (explaining the role and activities of the FBI in combating international terrorism); see also *supra* notes 106-112 and accompanying text (discussing why the FBI is the leader of choice for international terrorism investigations).

131. See *Intelligence for Law Enforcement: Statement on Intelligence Community-Law Enforcement Cooperation Before the Senate Select Comm. on Intelligence*, 103d Cong. 63 (1995) (statement of Jeffery F. Smith, General Counsel, Central Intelligence Agency) (stating that one of the roles of the CIA in international terrorism intelligence activity is to coordinate efforts with law enforcement agencies); see also Tim Weiner, *The CIA Seeks Out Informers On Terrorism and Finds Them*, N.Y. TIMES, Sept. 6, 1996, at A2 (recognizing that the CIA must concentrate on intelligence and cooperate with other agencies' intelligence activities to maximize the best options for the President in the fight against overseas terrorism).

132. See 139 CONG. REC. S13,410-13 (daily ed. Oct. 14, 1993) (statement of Sen. DeConcini) (recognizing that both the FBI and CIA are active in tracking and monitoring international terrorist activities through intelligence). See generally General Accounting Office, *supra* note 43, at 20-41 (delineating the cooperation among agencies, departments and bureaus in combating international terrorism); see also General Accounting Office, *supra* note 126, at 14 (suggesting that cooperation among counter-terrorism agencies is leading to an overlap in appropriations committee jurisdiction, thus complicating spending and prioritizing issues); William R. Farrell, *Assessing Counter-Terrorism Policy*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM; U.S. PROCEDURAL ASPECTS, *supra* note 7, at 289, 292-99 (assessing the implementation of counter-terrorism legislation and finding that vague and ambivalent statutory language leads to complexity in implementation).

133. See S. REP. NO. 104-258, at 79-80 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3945 (describing the role of the CIA in intelligence gathering). The Brown Commission found that CIA intelligence dealing with international activities with the periodic cooperation of domestic law enforcement does not violate the National Security Act, which prevents the CIA from infringing upon the domestic jurisdiction of the FBI. See *id.* at 80 (explaining that although the expansion of the CIA is a potential concern, the CIA is not a "secret police" in the United States).

overlapping roles present a potential problem because the CIA, which is statutorily forbidden to engage in domestic affairs,<sup>134</sup> acts in close coordination with the primarily domestic institution, the FBI.<sup>135</sup>

Furthermore, the organizational purposes and structures of both agencies conflict with the idea of a joint counter-terrorism strategy.<sup>136</sup> As a law enforcement agency, the FBI investigates crimes, collects evidence, and arranges information for prosecution according to detailed constitutional and statutory rules.<sup>137</sup> On the other hand, the CIA does not disclose its activities to the courts, conduct overt operations, or follow the same legal procedures as the FBI in preparing cases for prosecution.<sup>138</sup> Although the FBI and CIA are experienced in overseas intelligence activities,<sup>139</sup> the agencies' differing intrinsic methods of organization and procedure may impede the prosecution of terrorists.<sup>140</sup> Moreover, critics question whether either the FBI or the CIA is the appropriate agency to wage the new war against international terrorism.<sup>141</sup> Because both agencies conduct specialized activi-

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134. See National Security Act of 1947, 50 U.S.C.A. sec. 403(d)(3) (1988) (prohibiting the CIA from conducting "police, subpoena, or law enforcement powers, or internal security functions").

135. See 135 CONG. REC. S8130-31 (daily ed. July 18, 1989) (statement of Sen. Specter) (remarking that the American public is wary of expanding intelligence authority between the CIA and FBI and that there is a need to "adequately monitor" these agencies' activities).

136. See Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331, 336-38 (1998) (comparing the roles of the FBI and CIA involving discovery in the prosecution of overseas criminals).

137. See *id.* at 337 (summarizing law enforcement agencies' responsibilities for a criminal investigation).

138. See *id.* (explaining that the CIA is less restrained by rules and procedures that apply to the FBI and prosecution).

139. See generally Don Edwards, *Reordering the Priorities of the FBI in Light of the End of the Cold War*, 65 ST. JOHN'S L. REV. 59, 66-72 (1991) (identifying past FBI overseas intelligence activities).

140. Robert Chesney, *National Insecurity: Nuclear Material Availability and the Threat of Nuclear Terrorism*, 20 LOY. L.A. INT'L & COMP. L.J. 29, 79-80 (1997) (arguing that the CIA and FBI need to strengthen cooperative efforts to overcome differences regarding intelligence gathering concerning weapons of mass destruction); see also Fredman, *supra* note 136, at 337 (arguing that the FBI and CIA engage in separate methods of investigating criminals abroad).

141. See Kopel & Olsen, *supra* note 20, at 332 (arguing that the FBI's expansion

ties and have limited resources, neither agency alone may be fully capable of combating the changing global terrorist threat.<sup>142</sup>

Nonetheless, the United States chooses to rely on *both* the CIA and FBI to fight foreign terrorism by incrementally expanding and adapting the roles of the CIA and FBI<sup>143</sup> to global political changes.<sup>144</sup> Because the threat of overseas terrorism is a national security priority,<sup>145</sup> the CIA and FBI are currently best situated to answer a terrorist attack quickly because of their presence and experience abroad.<sup>146</sup> Furthermore, a legal strategy against international terrorism has significantly increased the involvement and importance of law enforcement agencies, such as the FBI.<sup>147</sup> The CIA's intelligence capabilities, developed for Cold War intelligence gathering, are an essential element for combating overseas terrorists activities.<sup>148</sup> Thus, policymakers attempt to respond immediately to the threat of international

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overseas is not imperative, since the CIA has the ability and experience in operating overseas against terrorists); *see also* *Law Enforcement Techniques*, *supra* note 54 (debating whether the FBI or CIA is the proper agency for counter-terrorism activities). Arguably, the FBI is better equipped and more experienced in handling legal evidence in preparation for a criminal prosecution than the CIA. *See id.* On the other hand, the CIA or the military might be the proper institution for a long war against overseas terrorism, which is likened to low-intensity warfare. *See id.*

142. *See supra* notes 52-63 and accompanying text (discussing the changing nature of international terrorism as a borderline war, possibly requiring more than law enforcement and intelligence agencies can provide).

143. *See* Weiner, *supra* note 131 (noting that the CIA is using new methods and seeking to expand CIA teams to combat terrorism); *see also* S. REP. NO. 104-258, at 80, *reprinted in* 1996 U.S.C.C.A.N. 3945 (remarking on the combination of CIA overseas terrorism intelligence and law enforcement agencies).

144. *See generally* Howard M. Shapiro, *The FBI in the 21st Century*, 28 CORNELL INT'L L.J. 219, 222-24 (1995) (distinguishing the new purposes of the FBI and CIA after the Cold War).

145. *See supra* notes 26-37 and accompanying text (identifying international terrorism as the United States' highest national security threat).

146. *See* General Accounting Office, *supra* note 43, at 30-32 (suggesting that the cooperative efforts of current counter-terrorism agencies are sufficient to fight terrorism abroad).

147. *See supra* notes 99-112 and accompanying text (discussing the role of the FBI against terrorism overseas).

148. *See* General Accounting Office, *supra* note 43, at 30-31 (emphasizing the need for CIA intelligence gathering against terrorism).

terrorism by augmenting and conforming the present capabilities of both the CIA and FBI.

### III. RAMIFICATIONS OF EXPANDING LAW ENFORCEMENT COUNTER-TERRORISM ACTIVITIES

The United States is wholly committed to meeting the international terrorist threat head-on, pouring tremendous amounts of resources and energy into the counter-terrorism effort.<sup>149</sup> Accordingly, the United States is expanding its extraterritorial jurisdiction so its agencies can conduct increasing levels of law enforcement activities against terrorism abroad.<sup>150</sup> While the expansion of proactive law enforcement activities is necessary, there are unfavorable consequences of counter-terrorism activities that must be examined and mitigated to maintain democratic principles and the rule of law.

#### A. RECIPROCITY AMONG NATIONS' LAW ENFORCEMENT ACTORS

One adverse legal implication of expanding the extraterritorial jurisdiction of United States law enforcement agencies overseas is the potential for reciprocity.<sup>151</sup> Reciprocity suggests that foreign law enforcement actors will investigate possible terrorist acts committed within the jurisdiction of the United States against foreign nationals, property, or national interests.<sup>152</sup> The concept of reciprocity limits

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149. See *supra* notes 99-148 and accompanying text (delineating the United States' commitment against international terrorism through its law enforcement and intelligence agencies).

150. See *generally supra* notes 88-98 and accompanying text (outlining antiterrorist legislation that extends the extraterritorial jurisdiction of the United States).

151. See *FBI Authority To Seize Suspects Abroad*, *supra* note 96, at 41 (statement of Abraham D. Sofaer, Legal Adviser, United States Department of State) (providing a context for the concept of reciprocity regarding counter-terrorism policy). Another nation may use the United States' legal position against the United States in the future, which may conflict with American interests. See *id.* at 41. For example, Russia, acting through the KGB, might conduct investigations in the United States, in search of alleged terrorists, possibly without the consent of the United States. See *generally id.* at 41-44.

152. See Kopel & Olsen, *supra* note 20, at 330 (commenting on possible implications of setting precedent under international law for allowing foreign law en-

government actions abroad by restraining a nation from engaging in activities that would otherwise negatively impact its national interest if another state engaged in identical undertakings.<sup>153</sup> Thus, United States law enforcement officials must consider their own actions when combating terrorists overseas or face similar treatment by foreign officials investigating terrorist acts in the United States.<sup>154</sup>

Under the present law of the United States, for example, abductions are permissible against individuals who violate United States law as long as they are located outside of the United States and pose a significant threat to United States national security.<sup>155</sup> Because of

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forcement agents into the United States to investigate crimes against their nationals or property); *see also* Krohne, *supra* note 36, at 159 (suggesting the United States could avoid reciprocity regarding foreign law enforcement investigations in the United States if an International Criminal Court existed). *But see* Christopher A. Donesa, *Protecting National Interests: The Legal Status Of Extraterritorial Law Enforcement By The Military*, 41 DUKE L.J. 867, 892 (1992) (arguing that the reciprocity argument does not carry practical weight in the international context for two reasons). First, countries would not attempt to face the immense consequences in violating United States sovereignty. *See id.* Second, the increase in international cooperation between a nation's law enforcement actors leaves little need to resort to the action of abduction. *See id.*

153. *See* Donesa, *supra* note 152, at 891-93 (suggesting possible limits that the reciprocity argument would have on extraterritorial arrest). One limitation is that the United States would weigh its policy interests and risks before attempting an unpopular action, similar to other smaller, weaker nations. *See id.* at 897; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES, sec. 102 cmt. b (1987) (stating that general and consistent practices of states can result in international norms or legal obligations).

154. *See generally* Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991) (hypothesizing a reciprocal action by the Iraqi government against an American businessman who is abducted and tried in Iraqi courts); Leslie McKay, Comment, *A New Take on Antiterrorism: Smith v. Socialist People's Libyan Arab Jamahiriya*, 13 AM. U. INT'L L. REV. 439, 458-59 (1997) (discussing the possibilities for reciprocity in the context of allowing terrorist victims to sue their attackers civilly in American courts).

155. *See* Arthur E. Shin, *On The Borders of Law Enforcement—The Use of Extraterritorial Abductions as a Means of Attaining Jurisdiction Over The International Criminal*, 17 WHITTIER L. REV. 327, 330-35 (1995) (providing United States doctrinal developments regarding international terrorism). The Ker-Frisbie Doctrine asserts that forcible abductions do not violate due process rights and do not mandate that a court release an alleged offender for the violation of international law. *See id.* at 334. The Supreme Court in *United States v. Alveriz-Machain* held that the forcible abduction of a Mexican defendant did not deprive United States

the new proactive stance adopted by the United States against international terrorism,<sup>156</sup> fueled by a growing, lethal, and devastating international threat,<sup>157</sup> the United States increasingly targets individuals that pose a danger to national security.<sup>158</sup> These circumstances might compel the United States to circumvent legal means of apprehension and increasingly rely on illegal abductions to capture terrorists before they strike.<sup>159</sup> By illegally abducting individuals abroad, the United States potentially subjects itself to similar treatment where foreign nations may attempt to abduct individuals on American soil. Abductions by foreign governments may include American law enforcement officials who carry out illegal abductions in their territory,<sup>160</sup> or

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courts of jurisdiction, nor did it violate the extradition treaty between Mexico and the United States. *See* *United States v. Alveriz-Machanin*, 504 U.S. 655, 657 (1992); *see also* *FBI Authority To Seize Suspects Abroad*, *supra* note 95, at 61 (statement of William P. Barr, Assistant Attorney General, Office of Legal Council, United States Department of Justice) (stating that the President must make decisions regarding national security and that the use of abductions by United States law enforcement is a viable option).

156. *See supra* notes 14-16 and accompanying text (observing a shift in American antiterrorism strategy from a reactive, punitive position to a proactive, preventive strategy).

157. *See supra* notes 26-37 and accompanying text (asserting that an increase in terrorism abroad and its lethality and destructiveness have prompted a more proactive response by law enforcement agencies).

158. *See* Jerry Seper, *U.S. Indicts bin Laden, Aide in Embassy Terror Bombings*, WASH. TIMES, Nov. 5, 1998, at A3 (accusing Osama bin Laden of masterminding terrorist bombing against the United States in Kenya and Tanzania). Bin Laden is feared to have the capacity to aid international terrorists monetarily in their efforts to strike United States targets. *See id.*

159. *See FBI Authority To Seize Suspects Abroad*, *supra* note 96, at 21, 61 (statement of William P. Barr, Assistant Attorney General, Office of Legal Council, United States Department of Justice) (suggesting that the use of abductions by the United States under "compelling circumstances" is likely if national security is threatened). Barr's statement is most applicable to the present circumstances regarding Osama bin Laden, whose capture the United States perceives as a matter of self-defense. *See id.*

160. *See id.* at 61 (statement of William Barr, Assistant Attorney General, Office of Legal Council, United States Department of Justice) (acknowledging that abduction by a foreign nation of American law enforcement officials is possible); *see also* NADELMANN, *supra* note 37, at 447-51 (comparing separate outcomes of abduction cases involving American, Canadian, and Mexican law enforcement officials).



individuals a foreign nation believes committed terrorist or criminal acts against its government.<sup>161</sup>

A proactive law enforcement strategy would not only increase the likelihood of future reciprocity in the form of abductions, but may also result in other reprisals by nations, further strengthening animosity toward the United States.<sup>162</sup> Moreover, by illegally abducting individuals from another country, the United States may endanger future cooperative ventures in the fight against international terrorism, since such actions tend to strain relations between states.<sup>163</sup> Thus, by abducting terrorists from abroad, the United States weakens international norms and procedures,<sup>164</sup> and exposes itself to future actions by foreign governments that are detrimental to the United States' interests.

## B. SOVEREIGNTY INFRINGEMENT

Seizures of suspected terrorists overseas by United States officials arguably constitute a serious breach of the territorial sovereignty of another nation and a violation of international law.<sup>165</sup> Sovereignty is

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161. See Abramovsky, *supra* note 154, at 151-53 (noting the possibility that another nation can abduct Americans on United States soil for crimes against that nation); see also Beres, *supra* note 39, at 240 (arguing that the United States could be accused by Cuba of harboring terrorists responsible for recent acts of terrorism in Cuba).

162. See Nadelmann, *supra* note 15, at 871-72 (finding that countries react negatively to the circumvention of extradition procedures, even when their own country is involved in the abduction).

163. See Pregent, *supra* note 95, at 95-96 (considering the implications of abductions concerning future relations between states such as the United States and Mexico). But see Shin, *supra* note 155, at 364 (arguing that the United States' use of abductions may be the only course of action for obtaining criminals because of international anti-American sentiments).

164. See Malloy, *supra* note 23, at 317 (arguing that unilateral actions lead to reciprocity among nations, resulting in the diminished strength of international law).

165. See *FBI Authority to Seize Suspects Abroad*, *supra* note 96, at 23, 31 (statement of Abraham D. Sofaer, Legal Advisor, United States Department of State) (stating that unconsented international law enforcement activities are in violation of sovereignty and international law); cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 432 (noting that international terrorism is a breach of international law and violation of sovereignty).

one of the most fundamental attributes of international law.<sup>166</sup> Under international law, the government of one country cannot conduct activities in the territory of another country unless acting with the consent of that nation.<sup>167</sup> Although the United States attempts to mitigate sovereignty infringement through the use of extradition treaties<sup>168</sup> and international cooperative undertakings,<sup>169</sup> the lack of oversight regarding the expansion of United States counter-terrorism efforts overseas poses potentially serious problems.<sup>170</sup> Abducting terrorists in another country's territory by unauthorized law enforcement agents, for example, infringes upon a nation's sovereignty and breaches international law.<sup>171</sup> As with the creation of adverse reciprocal treatment among nations toward the United States, the consequences of infringing on the sovereignty of another nation may increase tension between states and weaken the fight against overseas terrorism through the use of international law.<sup>172</sup>

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166. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 432(2) cmt. b (explaining that "[i]t is universally recognized as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent"); see also *FBI Authority To Seize Suspects Abroad*, *supra* note 96, at 31 (describing sovereignty as "one of the most fundamental attributes of international law").

167. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 432 cmt. b (explaining the infringement of sovereignty).

168. See NADELMANN, *supra* note 37, at 398-401 (commenting on the prevention of negative international responses to sovereignty infringement through the use of multilateral written agreements).

169. See *id.* at 315 (providing examples of international law enforcement cooperative efforts). The United States and other foreign governments participate in international cooperative efforts such as mutual legal assistance treaties, which reconcile differences among nations on topics such as evidence gathering. See *id.*

170. See *id.* at 477 (stating that the infringement of sovereignty is the most challenging issue facing the United States and other nations in the international system).

171. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 432(2) (1987) (requiring consent for a state's law enforcement officers to conduct activities within another state).

172. See Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L L. 1, 21-23 (1998) (identifying negative implications of sovereignty infringement under international law through the use of self-help); see also Malloy, *supra* note 23, at 317 (asserting that countries' failure to abide by existing international laws weakens the fight against terrorism abroad). But see Kash, *supra* note 41, at 144 (arguing that the infringement of sovereignty is

## C. COMPROMISING AMERICAN PRINCIPLES

The internationalization of law enforcement activities also poses potential concerns in the context of domestic law.<sup>173</sup> The broad authority and spending capacity allocated to law enforcement and intelligence agencies by congressional initiatives produce growing concerns among some policymakers that agencies will ignore laws limiting their international activities,<sup>174</sup> particularly when there is a perceived crisis.<sup>175</sup> Legislators fear that the FBI and intelligence agencies involved in counter-terrorism activities are assuming unchecked powers, which may possibly lead to abuse, miscalculation, and a large, unfettered federal police power.<sup>176</sup>

The internationalization of law enforcement is the present trend to fight terrorism abroad. Yet, gradual changes involving counter-terrorism initiatives, such as the militarization of law enforcement,<sup>177</sup>

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not a sufficient obstacle for conducting extraterritorial abductions).

173. See 135 CONG. REC. S8130, S8131 (daily ed. July 18, 1989) (statement of Sen. Specter) (observing that overseeing activities of law enforcement and intelligence agencies is an essential duty of Congress); see also 144 CONG. REC. E1843 (daily ed. Sept. 24, 1998) (statement of Rep. Skelton) (noting that the expansion of counter-terrorism agencies produce complications such as poor communications and duplication of activities); 142 CONG. REC. E341-02 (daily ed. Mar. 13, 1996) (statement of Rep. Lofgren) (arguing that a proposed Comprehensive Death Penalty and Antiterrorism bill would infringe on American constitutional rights); Edwards, *supra* note 139, at 79-83 (introducing legislation limiting FBI counter-terrorism investigation practices regarding American citizens). This legislation is intended to curb broad, vague powers given to the FBI through Presidential Directives for terrorist investigations. See *id.*

174. See *supra* notes 99-112 and accompanying text (detailing the growth of counter-terrorism law in enforcement activities overseas).

175. See *Vernonia School District 47J v. Acton*, 515 U.S. 646, 660 (1992) (O'Connor J., dissenting) (warning that the greatest dangers to our constitutional freedoms come during times of crisis). Present concerns over international terrorism as a crisis might provoke an overreaction by the government, thus expanding police powers or law enforcement institutions.

176. See 135 CONG. REC. S8130, S8131 (daily ed. July 18, 1989) (statement of Sen. Specter) (remarking on the possible ramifications of law enforcement practices regarding international terrorism); 142 CONG. REC. E341-02, (daily ed. Mar. 13, 1996) (statement of Rep. Lofgren) (identifying possible consequences for American individual rights as a result of the jurisdictional expansion of the FBI overseas). Rep. Lofgren suggests that the FBI's international overseas capabilities clash with the rights of individuals engaging in political activities. See *id.*

177. See Kopel & Olsen, *supra* note 20, at 269-70 (asserting that militarization

the FBI's international intelligence capabilities,<sup>178</sup> and the CIA's cooperative efforts with domestic institutions,<sup>179</sup> may overlap too extensively with domestic law enforcement, thus conflicting with prohibitive laws.<sup>180</sup> Additionally, the lack of sound policy governing counter-terrorism appropriations raises concerns in many policymakers' minds that there is a need for counter-terrorism laws that limit the growing power of counter-terrorism agencies.<sup>181</sup>

Unfettered United States international law enforcement activities not only threaten to violate laws regulating the powers of agencies fighting terrorism, but also compromise basic principles of traditional American law principles.<sup>182</sup> Concerns among legislators and scholars are growing regarding the possible sacrifice of Americans' individual constitutional rights for the benefit of a swift counter-terrorism response.<sup>183</sup> Foreign abductions, for example, do not comport with the American legal tradition.<sup>184</sup> The Supreme Court, how-

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of federal law enforcement has a trickle-down impact on law enforcement at the state and local levels).

178. See Jim McGee, *The Rise of the FBI*, WASH. POST, (Magazine), July 20, 1997 at W10 (questioning the expansion of FBI intelligence power).

179. See David M. Crane, *Divided We Stand: Counterintelligence Coordination Within The Intelligence Community of the United States*, 1995-DEC ARMY LAW. 26, 28-30 (1995) (differentiating the intelligence role of the CIA and FBI domestically and overseas).

180. See National Security Act of 1947, 50 U.S.C. sec. 401 (1994) (setting limits for the CIA, such as restricting the agency from performing domestic intelligence activities).

181. See Smith, *supra* note 66, at 278 (recognizing the possibility that Americans' rights may be compromised by increasing the power of the FBI); see also 141 CONG. REC. S13,995-04, S14,045 (daily ed. Sept. 21, 1995) (statement of Presiding Officer) (commenting on the misprioritizing of FBI appropriations concerning domestic and international terrorism); see also General Accounting Office, *supra* note 126 (finding a lack of government spending priorities and accounting of antiterrorism appropriations).

182. See Kopel & Olsen, *supra* note 20, at 330-31 (arguing that the internationalization of criminal law presents similar challenges to federalizing criminal law).

183. See 142 CONG. REC. E341-02 (daily ed. Mar. 14, 1996) (statement of Rep. Lofgren) (stating that lawful assemblies supporting foreign groups were labeled by cabinet officials because of their political views); see also McGee, *supra* note 178 (quoting Louis Freeh, Director, Federal Bureau of Investigation) ("[T]he FBI potentially could be the most dangerous institution in the United States if its awesome powers are not held in check. . .").

184. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Bren-

ever, has also legitimized law enforcement authority and discretion to act abroad by eliminating traditional procedural limitations of the FBI.<sup>185</sup> An instance in which the Court failed to promote principles of American law<sup>186</sup> was its decision to not extend Fourth Amendment principles to searches of citizens of other countries by American law enforcement officials abroad.<sup>187</sup>

The potential for abuse of power among agencies fighting international terrorism and the compromise of traditional American legal principles on the world stage are cause for Congress to reevaluate and reconsider legislation that establishes proper rules of conduct for law enforcement overseas. Moreover, although the Supreme Court acts deferentially toward activities in the international theater, the Court must remain steadfast to protect against actions that violate constitutional norms.<sup>188</sup>

#### IV. RECOMMENDATIONS

The existence of potentially negative implications of overextension of international counter-terrorism law enforcement powers should encourage the United States to resolve these complex issues on both a domestic and international level. At the same time, however, the United States must respond quickly to an increasingly lethal

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nen, J., dissenting) (stating that "when United States agents conduct unreasonable searches, whether at home or abroad, they disregard our Nation's values").

185. *See id.* at 259 (refusing to apply Fourth Amendment principles to law enforcement agents abroad).

186. *See id.* This case arose when Mexican law enforcement agents abducted a suspected Mexican drug trafficker and murderer of a DEA agent and delivered him to United States Marshall's in California. *See id.* Although there existed an extradition treaty between the United States and Mexico, United States law enforcement agents paid Mexican officials for the abduction and deliverance of Verdugo-Urquidez. *See Miller, supra* note 37, at 872-74 (providing background facts of *Verdugo-Urquidez*).

187. *See Verdugo-Urquidez*, 494 U.S. at 274-75 (holding unreasonable searches and seizures involving international circumstances does apply to non-resident Americans). *But see id.* at 282 (Brennen J., dissenting) (arguing that United States law enforcement must abide by constitutional principles since the United States is itself a creature of the Constitution); Donsea, *supra* note 152, at 896 (arguing that the decision in *Verdugo-Urquidez* broadened the powers of law enforcement abroad).

188. *See Baker v. Carr*, 369 U.S. 186, 211 (1962).

overseas terrorist threat by adapting and changing its present counter-terrorism strategy.<sup>189</sup> The responsibility for changing the United States' response to international terrorism lies not only with agencies involved in the fight against terrorism, but also with Congress.<sup>190</sup> To begin mounting an effective counter-terrorism strategy, Congress must develop comprehensive, well-reasoned legislation that addresses the changing nature of terrorism abroad.<sup>191</sup>

#### A. REFORM LEGISLATION

A comprehensive counter-terrorism bill, enacted specifically for and prior to international terrorist acts, would provide a foundation for a consistent, cohesive counter-terrorism policy.<sup>192</sup> The new bill should create a uniform counter-terrorism strategy by bridging gaps among existing terrorism legislation, improving inter-agency coordination accountability, and setting forth clear, forward-looking objectives. This new bill would integrate and compile all present terrorism legislation, as policymakers would formulate a uniform strategy to combat the new terrorist menace.<sup>193</sup>

The first issue that legislation must address is the clarification of the definition of international terrorism.<sup>194</sup> By eliminating ambiguities

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189. See *supra* notes 24-37 and accompanying text (discussing how American law enforcement's proactive response overseas is fueled by a growing, more dangerous terrorist threat abroad).

190. See 144 CONG. REC. E1843 (daily ed. Sept. 28, 1998) (statement of Rep. Skelton) (urging Congress to unify antiterrorism strategy abroad and scrutinize and evaluate counter-terrorism policies).

191. See General Accounting Office, *supra* note 43, at 19 (finding no single federal law comprehensively addressing terrorism abroad).

192. See *FBI's Role in Counter-terrorism Strategy, Hearings Before the Senate Judiciary Comm.*, 105th Cong. (1998), available in LEXIS online, Cong. Rec. (commenting on the need for Congress to establish national objectives for fighting overseas terrorism).

193. See 142 CONG. REC. E341-02 (daily ed. Mar. 13, 1996) (categorizing present legislation as "a Christmas tree on which an assortment of amendments are being hung"); see also Roberto Suro & Dana Priest, *Plan to Overhaul Antiterrorism Strategy Would Boost NSC's Role*, WASH. POST, Mar. 24, 1998, at A7 (considering the consolidation of all counter-terrorist activities under the authority of the National Security Council Office).

194. See Beres, *supra* note 39, at 242-46 (suggesting that a clear definition of international terrorism through a single set of standards prevents the incorporation

resulting from the present definitions of international terrorism, the United States can more accurately assess the overseas terrorist threat and promote uniform, consistent activities among counter-terrorism agencies.<sup>195</sup> Because the United States bases its response to terrorism abroad on its law enforcement agencies, the standard definition adopted should be that of the FBI's. The adoption of the FBI's definition would instill uniformity among counter-terrorism agencies, produce clear, corresponding initiatives toward the accomplishment of law enforcement goals, and set forth a consistent objective standard for determining terrorist acts.<sup>196</sup>

Second, thoughtful, narrowly tailored legislation would promote effective counter-terrorism policies and prevent potential legal conflicts among agencies by properly allocating funding and authority.<sup>197</sup> For the United States to confront international terrorism, agencies assigned to the task must have a clear understanding of their authority and purpose.<sup>198</sup> Congress should establish a governmental agency responsible for government-wide collection and review of funding data, assessment and the prioritization of antiterrorism activities, and coordination and evaluation of current antiterrorism initiatives.<sup>199</sup>

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of discrepant activities).

195. See General Accounting Office, *supra* note 43, at 16 (noting that different agencies and departments do not share a universal definition for international terrorism, nor a term to describe counter-terrorism programs). Agencies practice divergent activities according to separate agendas regarding the same objective. See *id.* at 16 (comparing the Department of Defense with the FBI regarding agency antiterrorism objectives); see also General Accounting Office, *supra* note 126 (finding that ambiguity regarding the assessment of the international terrorist threat has an adverse impact on antiterrorism funding and spending).

196. See *supra* notes 38-63 and accompanying text (discussing the need for a consistent, universal international terrorism definition).

197. See General Accounting Office, *supra* note 126 (concluding that the lack of a single governmental agency to oversee international terrorism activities has led to misappropriation of funds and the overlapping of agency roles).

198. See 135 CONG. REC. S8130, S8131 (daily ed. Jan., 1989) (statement of Sen. Specter) (arguing that if Congress does not state clear goals and objectives fighting international terrorism, law enforcement and intelligence agencies will lack clear objectives as well); see also *FBI's Role in United States Counter-terrorism Strategy*, *Hearings Before the Senate Judiciary Comm.*, *supra* note 192 (1998) (noting that Congress does not presently have clear understanding of national objectives regarding a international terrorism strategy).

199. See General Accounting Office, *supra* note 126 (recommending better

Without a governmental body performing such duties, agencies' activities and spending will not be sufficiently tailored to fight a changing global terrorism threat.<sup>200</sup>

## B. INTERNATIONAL COOPERATION

Although these recommendations address some changes in law and policy, they do not completely resolve issues regarding sovereignty infringement or the consequence of reciprocity under international law. If the United States proceeds with nonconsensual, unilateral extraterritorial activities and utilizes its law enforcement capacities within the territory of another nation, problems will arise.<sup>201</sup> In an effort to mitigate the probability of infringement upon the territorial integrity of other nations and the possibility of reciprocal treatment, the United States should explore international cooperative efforts, such as prosecution of terrorists before the International Criminal Court ("ICC") or the strengthening of present extradition treaties.<sup>202</sup>

Participation in the ICC would increase cooperation with other nations, lessen extradition problems, and foster cooperative law enforcement relationships with nations in apprehending and prosecuting transnational terrorists.<sup>203</sup> The ICC might accomplish these objectives by ensuring fair, unbiased criminal proceedings of international terrorists based on a uniform set of rules.<sup>204</sup> Moreover, these proceedings would be legitimized by the participation and con-

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management and coordination among governmental agencies).

200. See General Accounting Office, *supra* note 43, at 16-20 (recommending a reevaluation of combating the international terrorist threat in relation to agencies' capabilities).

201. See generally Nadelmann, *supra* note 22, at 41 (discussing possible outcomes of infringing upon a nation's sovereignty).

202. See MacPherson, *supra* note 172, at 46-47 (suggesting the use of an ICC to assist in prosecuting international terrorists); see also NADELMANN, *supra* note 37, at 468-70 (observing successful international cooperation programs that avoided pitfalls of sovereignty infringement).

203. See MacPherson, *supra* note 172, at 46-47 (noting the benefits of an ICC).

204. See *id.* at 58-59 (asserting that an international court would replace complexities and barriers associated with nations obtaining jurisdiction and prosecuting overseas terrorists).



sent of each nation and the establishment of laws and definitions of criminal acts falling within the jurisdiction of the Court.<sup>205</sup>

Furthermore, cooperation among nations' international law enforcement agencies with those of the United States through mutual assistance programs<sup>206</sup> will lessen friction among law enforcement systems, decrease the use of abductions as a necessary alternative, and increase the effectiveness of law enforcement techniques such as evidence gathering and apprehending suspected terrorists.<sup>207</sup> The United States should promote cooperation through universally-accepted principles, processes, and instruments such as the United Nations and extradition treaties.<sup>208</sup>

## CONCLUSION

Because of the changing threat of international terrorism, the United States must take a more provocative, preemptive stance against terrorists abroad. Since the first line of defense against a terrorist attack is our law enforcement agencies, Congress must take the initiative and provide these agencies with the essential guidance and means necessary for a successful counter-terrorism strategy. In doing so, law enforcement and intelligence agencies can avoid the adverse ramifications of fighting well-armed and well-supported terrorists overseas. Furthermore, the increasing budgets and activities of counter-terrorism agencies require Congress to enact legislation that uniformly defines international terrorism and establish a government body for overseeing agency initiatives. Before sending our men and women overseas and committing our resources to this new war, we must have clear objectives and coordinated implementation so our

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205. See *id.*, at 51-53 (outlining essential elements for an effective ICC).

206. See Malloy, *supra* note 23, at 317 (arguing that international cooperation that includes the United States will strengthen international law).

207. See NADELMANN, *supra* note 37, at 469-77 (discussing possible results of increasing international law enforcement overseas).

208. See Blaine Harden, *Clinton Urges Global Unity Against Terrorism*, WASH. POST, Sept. 22, 1998, at A13 (urging countries' law enforcement units to work cooperatively through international agreements and institutions). President Clinton recently acknowledged the need to use international institutions and instruments, such as the United Nations and Global Antiterrorism Conventions, to facilitate cooperative efforts among Western and Islamic States. See *id.*

law enforcement agencies can promulgate a successful strategy against terrorists.